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No. 87-1206

FILED
OCT 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

KATHRYN ISABELLA MESA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

SHABBIR A. EBRAHIM, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The criminal charges in this case stemmed from accidents involving petitioners that occurred while petitioners were "on duty and acting in the course and scope of [their] employment with the Postal Service" (J.A. 5). It is our contention that the plain

language of 28 U.S.C. 1442(a)(1) permits petitioners to remove their prosecutions to federal court. Each petitioner is an "officer of the United States * * * or person acting under him" against whom a "criminal prosecution [has been] commenced in a State court" for an "act under color of such office" (28 U.S.C. 1442(a)(1)). Driving a postal truck is an integral part of a postal worker's official duties; he is authorized to drive that truck only because he is a postal employee and he may do so only in the course of delivering the United States mail. It follows that the employee drives the truck "under color of" his office as a postal worker.

1. Respondent and the court below would read into Section 1442(a)(1) a requirement of federal law justification for the challenged conduct that goes far beyond a showing that the suit arose from actions taken within the scope of the employee's authority. While all agree that removal is unavailable unless the performance of one's responsibilities as a federal employee is somehow challenged by the state proceedings, respondent and the court of appeals would require further that the defendant employee invoke an explicit federal law defense—most commonly, that the conduct as alleged by the State is authorized by federal law. They would require, in other words, that vehicular homicide, speeding and failure to yield be, in the circumstances of the individual case, authorized by federal law. See, *e.g.*, Pet. App. 10a ("the removal petitions here do not allege that the acts complained of were justified by the officers' duties under federal law"); Resp. Br. 40 ("petitioners did not assert that their charged acts (negligent driving) were justified under the laws authorizing their duties").

One can imagine a federal law setting high speed limits for postal workers delivering the mail, and purporting to preempt any lower state limits, to which a postal worker prosecuted for speeding could point as a specific justification for his actions. But there is no requirement, nor can one plausibly be read into Section 1442(a)(1), that the employees' actions be justified by federal law in this sense. The term "color" implies the *appearance* of a right, authority or office, such as any federal employee enjoys when he is performing official duties, whether his actual performance of those duties is justified by federal law or not. Section 1442(a)(1) is not limited to employees "with a defense based on federal law," and the words "under color of office" will not bear such weight.

Respondent makes no attempt to come to grips with the actual language of Section 1442(a)(1). Nor does respondent satisfactorily explain the fact that similar language in the contemporaneously enacted civil rights laws has always been interpreted in a broad way. Indeed, the phrase "under color of state law" in those statutes is understood expressly to negate the requirement that the actions in question be justified by law. See *West* v. *Atkins*, No. 87-5096 (June 20, 1988), slip op. 7 (construing 42 U.S.C. 1983); *United States* v. *Classic*, 313 U.S. 299, 326 (1941) (construing predecessor of 18 U.S.C. 242). Respondent contends (Br. 20) that the policies underlying Section 1442(a)(1) differ from those underlying the civil rights statutes and that a restrictive reading "makes sense" in the former context but not the latter. But, as we explained in our opening brief (at 28-31), the policies underlying Section 1442(a)(1) fully support a reading of the statute as broad as that of Sections 242 and 1983.

2. In lieu of any discussion of the precise language used in Section 1442(a)(1) and the contemporaneous civil rights statutes, respondent cites two subsequent statutes as evidence that Congress "refuted petitioners' vision of federal official removal" (Br. 19). Respondent relies (Br. 14-16) first on Section 1442(a)(3), which permits a court officer to remove civil and criminal actions "for or on account of any act done under color of his office or in the performance of his duties as such officer." Respondent contends that "[p]etitioners' reading of 'under color of office' as referring to all acts in performance of duties not only renders section 1442(a)(3) superfluous as read today, but makes no sense historically." Respondent argues (Br. 14-15) that the "performance of duties" clause of Section 1442(a)(3) is in fact broader than the "under color of office" language.[1]

Section 1442(a)(3) was one of a number of specialized removal provisions adopted as extensions of the Force Bill of 1833, which itself applied only to officers acting under color of the revenue laws. In a series of enactments, Congress extended the right of removal to collectors of the internal revenue (1864), to persons acting under color of the Elective Franchise Act (1871), to officers of either House of Congress (1875), to court officers (1916), to soldiers in the military service (1916), and to prohibition officers (1919). Pet. Br. 13-14. All these specialized removal provisions were rendered superfluous by Congress' decision in 1948 to extend removal protection "to [a]ny officer of the United States or any agency thereof,

[1] It is unclear, however, what distinction in meaning respondent would draw between the two phrases, since it hastens to note (Br. 15) that "even the broader phrase requires reliance upon federal authority."

or person acting under him." The fact that subsection (a)(3)—like subsection (a)(4), which applies to officers of either House of Congress—remains in the statute books as historical "residue" of these earlier enactments (see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1057 (3d ed. 1988)) should not affect the proper reading of subsection (a)(1).

In any event, Congress intended, as this Court has already concluded, that the phrases "in the performance of his duties" and "under color of office," both of which appear in subsection (a)(3), have the same meaning. In *Gay* v. *Ruff*, 292 U.S. 25, 38 (1934) (quoting H.R. Rep. 776, 64th Cong., 1st Sess. 2 (1916)), the Court noted that the present subsection (a)(3) (formerly Section 33 of the Judicial Code) was designed to give United States marshals executing process " 'the same protection in all cases given to officers acting under the revenue laws' " by a different section containing only the "color of office" language now in subsection (a)(1).

The second statute upon which respondent relies is the Federal Drivers Act, 28 U.S.C. 2679, which, respondent contends (Br. 19), "provides for removal of civil suits against federal drivers upon certification by the Attorney General that the incident occurred while the official was performing his duties." Respondent maintains (*ibid.*) that this statute "was necessary because section 1442(a)(1) does not allow removal in the absence of a federal defense," and that it "would be superfluous under petitioners' construction of section 1442(a)(1)." Respondent, however, has simply mischaracterized the statute.

The Federal Drivers Act provides an exclusive remedy against the United States "for injury or loss

of property or personal injury or death, resulting from the operation by an employee of the Government of any motor vehicle while acting within the scope of his office or employment" (28 U.S.C. 2679 (b)). The removal of such suits to federal court and the substitution of the United States as defendant are mandated by the Act (28 U.S.C. 2679(d)). The purpose of the statute was not to require removal of civil suits against federal employees, which of course was already permitted by Section 1442(a)(1), but rather to transform such suits into suits against the United States under the Federal Tort Claims Act. Removal is required because tort claims against the United States are within the exclusive jurisdiction of the district courts (28 U.S.C. 1346(b)).

3. As noted, respondent and the court below would permit removal only when the defendant attempts to justify under federal law the specific conduct alleged by the State. In our opening brief (at 15-25), we showed that such a reading of the statute is refuted by this Court's repeated admonition, in both civil and criminal cases, that a federal official need not admit having done the act charged in order to obtain removal. See, *e.g.*, *Maryland* v. *Soper (No. 1)*, 270 U.S. 9, 33 (1926) ("It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution."); *Cleveland, C. &c. R.R.* v. *McClung*, 119 U.S. 454, 461 (1886) ("the right to a removal is not taken away because the [federal official] says in his defense that the act charged was not in fact done").

Respondent attempts (Br. 24-35) to accommodate these cases by expanding its conception of the prerequisite "federal defense" to include a federal official's denial that he committed the charged acts. Respondent contends (Br. 25) that a state law prosecution that, "either deliberately or mistakenly, [is] based solely upon the official's performance of federal duties * * * would in effect penalize compliance with federal law and violate the Supremacy Clause." "The Supremacy Clause," respondent further contends (*ibid.*), "would then supply the federal defense justifying removal." Thus, when a federal employee performing official duties denies that he violated state law, his "denial *is* the allegation of a federal defense" (*ibid.* (emphasis in original)).

This expanded conception of the "federal defense" requirement amounts to a confession of error. For the implication of respondent's position appears to be that a federal employee acting within the scope of his official duty can obtain removal simply by pleading not guilty to the state charges, whether the assertain of innocence is based on any explicit federal law defense or simply on a denial of the alleged wrong. Since petitioners pleaded not guilty they are, on this theory, entitled to removal.

Respondent tries to backpedal from this result by contriving (Br. 28-29) a three-part test for removal by those who claim to be innocent of the charges against them: "the official must demonstrate that: 1)he committed no acts other than those required by his duties; 2) there was a discernible reason for his prosecution, even though based upon mistake (or animus toward federal authority); and 3) the reason was connected with his having been present carrying out his duties at the time the charged act was allegedly committed." Respondent then asserts (Br. 29), without explanation, that "[p]etitioners fail to meet this test."

In fact, petitioners clearly do meet this test. (1) Driving postal trucks in the course of delivering the mail are "acts * * * required by [petitioners'] duties" and there are no other acts upon which their prosecutions are based.[2] (2) There is a discernible reason for their prosecution: each was involved in an accident, and the State claims petitioners were at fault. Petitioners claim the State is mistaken. (3) The reason for the prosecution (*i.e.*, the accident) is connected with each petitioner's having been present carrying out his duties (*i.e.*, driving a mailtruck on the public highways) at the time the charged act was allegedly committed.[3]

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[2] It is true that "negligent driving" is not required by their duties (Br. 40), but respondents have pleaded not guilty to that charge and their assertions of innocence must be taken at face value for purposes of judging the propriety of a removal motion. Although respondent says (Br. 28) that the official must "demonstrate" that "he committed no acts other than those required by his duties," respondent surely does not mean to suggest that a trial on the merits is necessary as a prerequisite to removal.

[3] Respondent cautions (Br. 29 n.13) that the connection required here is not mere "but for" causation; rather "[t]he official must demonstrate that his mere presence enforcing or executing federal law was the proximate cause of the prosecution." It is unclear what "the proximate cause of the prosecution" means in this context (as opposed to the proximate cause of the underlying accident). But if respondent intends to suggest that the federal official must demonstrate animus on the part of the charging officials that is clearly incorrect. Such a requirement is inconsistent with the language of the statute (which focuses on the actions of the federal official, not the charging officials), has been rejected by this Court (*e.g.*, *Maryland* v. *Soper (No. 1)*, 270 U.S. at 33), and would be unworkable in practice.

Respondent's three-part test would in fact be satisfied by any federal official, performing his official duties within the scope of his authority, who pleaded not guilty to the charges against him. It follows that we can simply jettison this artificial gloss on the plain terms of the statute and frankly acknowledge that officials acting in the performance of their federal duties, and not simply "in the ambit of their personal pursuits" (*Screws* v. *United States*, 325 U.S. 91, 111 (1945)), are acting "under color of" their offices as federal employees within the meaning of Section 1442(a)(1).

4. Respondent offers analyses of a number of this Court's cases, said to support the proposition that removal has never been recognized except where the defendant intends to offer a federal defense. Many of these decisions are discussed at length in our opening brief (at 16-25). Neither those cases, nor any of the others raised presently by respondent, are inconsistent with the removal of state criminal prosecutions of federal employees based on conduct—whether proper or not—that comes within the scope of their employment duties. On the contrary, a number of the cases cited by respondent draw a rather clear distinction, turning on whether the state charges arise from actions within the scope of the defendant's duty and authority as a federal employee.

In *Gay* v. *Ruff*, *supra*, the Court denied removal, under the predecessor of the current subsection (a)(3), to a court-appointed receiver for a railroad, in a suit alleging negligent operation of a train by railroad employees. The Court was obviously struck by the distinction between the role of a receiver, who is appointed to manage private assets under the indirect supervision of the court, and that of more typical

"officers of the court," who serve process, execute court orders, and generally act as an enforcement arm of the court. As the Court put it, this suit "does not relate to any operation of the federal government." 292 U.S. at 34. Unlike other "officers of the court," the receiver "is not entrusted * * * with the service or execution of any process of the court" (*id.* at 39). Thus no challenge to the exercise of federal governmental authority was in issue.[4]

Other cases, as well, evidence a clear understanding that the purpose and rationale of the removal statute is to provide a means by which the federal government can take from state courts, as it deems necessary, decisions about the propriety of actions of federal employees within the scope of their authority —whether or not such actions are ultimately found appropriate. See, *e.g.*, *Willingham* v. *Morgan*, 395 U.S. 402, 408 (1969) ("The question, then, is whether petitioners adequately demonstrated a basis for removal by showing that their only contact with respondent occurred while they were executing their federal duties inside the penitentiary."); *Maryland*

[4] The Court also relied (292 U.S. at 35) significantly on two distinct statutes suggesting that removal in the circumstances of that case would be contrary to congressional intentions. One statute (Act of March 3, 1887, ch. 373, § 3, 24 Stat. 553-554, as corrected by Act of August 13, 1888, ch. 866, § 1, 25 Stat. 435-436) provided that the fact that the defendant was a federal receiver should not preclude maintenance of an action against him in state court. The other statute, the Act of April 22, 1908, ch. 149, § 6, 35 Stat. 66, as amended by Act of April 5, 1910, ch. 143, § 1, 36 Stat. 291, provided that suits for injuries resulting from negligence in the operation of a railroad, although arising under a federal statute, could be brought in a state court, and if so brought, could not be removed to the federal court.

v. *Soper (No. 2)*, 270 U.S. 36, 44 (1926) (prosecutions found not removable because "[t]hese were not prosecutions * * * commenced on account of acts done by these defendants solely in pursuance of their federal authority"); *Maryland* v. *Soper (No. 1)*, 270 U.S. at 33 ("It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty."); *Davis* v. *South Carolina*, 107 U.S. 597, 600-601 (1883) ("His petition set out the necessary facts showing that the homicide which was charged against him as a crime took place while he was in discharge of his official duty.")

McKee v. *Rains*, 77 U.S. (10 Wall.) 22 (1870), cited by respondents as irreconcilable with the government's position, in fact turns on the question of the scope of the U.S. Marshal's legal duties and authority, and whether it extended to the seizure of one person's goods to satisfy the debts of another. The Court found that the Marshal was acting outside the scope of his authority as defined by Congress, and the applicable removal statute did not, at that time, allow removal by court officers based on duties defined by the court.[5] Removal could not be granted because the employee was not acting within the scope of any authority that the Court was at liberty to consider.

[5] See Resp. Br. 12 n.5. At that time, the applicable statute allowed removal only on the basis of authority derived from the President or from Act of Congress. See *Buck* v. *Colbath*, 70 U.S. (3 Wall.) 334 (1866). Thus it is no answer that that Marshal was within the scope of his duties as defined by the court.

5. Respondent argues (Br. 36-45) that, in the absence of a defense expressly based on federal law, Congress is without power to create a federal forum for federal officials acting under color of federal law who are charged with violations of state law. This contention is without merit. Article III, Section 2 of the Constitution broadly extends the federal judicial power to "all Cases," at law or equity, "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." From the beginning this Court has construed the "arising under" grant expansively. Thus, in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 737 (1824), the Court held that any suit brought by a bank created pursuant to federal statute was a suit "arising under" federal law. Although this Court noted in *Osborn* that every action involving a federally chartered bank raises a *potential* question of federal law, it did not limit its holding to cases where such issues were present. It broadly ruled that Congress can open the doors of the federal courts to all controversies involving the legal rights of national banks. See *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 905 (1824) (holding that federally chartered bank can bring suit in federal court to enforce an ordinary contract claim).

As Professor Mishkin has observed, "[a]t the very least, [the *Osborn* case] establishes that the judicial power under the federal question clause of Article III may be brought to bear upon any litigation to which a congressionally chartered corporation is a party, though the substantive rule for decision be state-made." Mishkin, *The Federal "Question" in the Dis-*

trict Courts, 53 Col. L. Rev. 157, 187 (1953).[6] Similarly, and "[w]ithout doubt, a federal forum should be available for all suits involving the Government, its agents and instrumentalities, regardless of the source of the substantive rule" (*id.* at 193). See also *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 475 n.5 (1957) (Frankfurter, J., dissenting on other grounds) ("[T]he fact that officers of the Federal Government were parties may be considered sufficient to afford access to the federal forum.").

Thus, whatever the merits of so-called "protective jurisdiction" where private parties are concerned,[7]

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[6] Another example of such federal jurisdiction for a federally chartered corporation, not limited to cases in which the substantive rule of decision is federal, is found in 12 U.S.C. 1819 (providing, with exceptions, that "[a]ll suits of a civil nature at common law or in equity to which the [Federal Deposit Insurance Corporation] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof"). Cf. 28 U.S.C. 1346(b) (providing exclusive federal jurisdiction for tort suits against the United States, but making liability depend upon state law).

[7] Commentators have long recognized that Congress may, pursuant to its Art. I powers, provide protective jurisdiction for private parties. See, *e.g.*, *Moore's Commentary on the U.S. Judicial Code* ¶ 0.03(22), at 138 (1949); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law and Contemp. Probs. 216, 224-225 (1948); Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 20 (1957); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *supra*, at 473-478, 983-989. This Court has never held to the contrary, and a number of opinions support such jurisdiction. See, *e.g.*, *Schumacher* v. *Beeler*, 293 U.S. 367, 374 (1934) (Congress, "by virtue of its constitutional authority over bankruptcies," may vest jurisdiction in the federal district courts to hear claims asserted by bankr[illegible]y trustees, even though those claims

it is clear that Congress can act to provide a federal forum for the review—under state law—of the acts of its agents under color of federal office. "A case based on the act of a federal employee acting within the scope of his employment arises under the Constitution, which creates the authority to authorize his work, and under the laws of the United States that do authorize it, that make him a federal employee within a federal program with a federal function." Pet. App. 16a (Noonan, J. dissenting).

In *Osborn*, the need for providing the Bank of the United States with a federal forum was clear: "[T]he Bank was the object of great popular hatred and of measures of reprisal by many state legislatures. It was sadly in need of a federal haven for its litigation." Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L.J. 393, 405 (1936). Similarly, Congress in the exercise of its Article I authorities can determine that the possibility of local hostility to federal officials and federal programs requires a federal haven for federal employees charged with violations of state law. For "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 363 (1816) (Johnson, J., concurring).

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rest solely on state law and even though "diversity of citizenship" is absent); *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949) (plurality opinion) (Congress, "in the exercise of its powers under Art. I," may confer jurisdiction on federal district courts to hear civil actions between citizens of the District of Columbia and citizens of the several states "regardless of lack of diversity of citizenship" within the meaning of Art. III); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 459-460 (1957) (Burton, J., with Harlan, J., concurring) ("the constitutionality of [a statute permitting federal courts to adjudicate collective bargaining disputes 'without regard to the citizenship of the parties'] can be upheld as a congressional grant to Federal District Courts of what has been called 'protective jurisdiction' "); *id.* at 483-484 (Frankfurter, J., dissenting) (Congress may grant federal courts jurisdiction over non-federal claims based on "the presence of some substantial federal interest").

6. Underlying all of respondent's arguments is the assumption (see, *e.g.*, Br. 9, 44-45) that federal interests are simply not implicated when a federal official is charged with acts unprotected by federal law. We disagree, and the disagreement goes to the heart of this case. Whenever a federal official is charged with a state crime for actions within the scope of his employment, the prosecution poses a challenge to the manner in which the official has performed his duties. That challenge is no less where the official responds that he did not do the act charged than where he claims that his behavior is shielded by an official privilege or immunity.

Suppose, for example, an FBI agent investigating violations of the Civil Rights laws by local authorities is arrested for drunk driving while engaging in surveillance. His defense is that he had not drunk any alcohol and is completely innocent of the charges; he was simply doing his duty pursuant to federal law and is being interfered with in the performance of that duty by some of the very local officials that he is investigating. Clearly, there is a sufficient federal interest in the case to support removal to federal court. But that federal interest does not depend on the existence of a federal defense. Nor does it depend on a pre-removal determination that the agent is in-

nocent of the charges or that his prosecution is motivated by local animus. Whether the criminal charges in any given case are justified or unjustified cannot be known until after a determination on the merits of the case. Regardless of the ultimate outcome, the federal government has a strong interest in providing a federal forum in which such issues can be resolved without "interference by hostile state courts." *Willingham* v. *Morgan*, 395 U.S. at 405.

It is respectfully submitted that the judgment of the court of appeals should be reversed.

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OCTOBER 1988

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